No. 15520

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JULES POND,

Appellant,

vs.

GENERAL ELECTRIC COMPANY, a corporation,

Appellee.

BRIEF OF APPELLANT.

RUSSELL K. LAMBEAU,
649 South Olive Street,
Los Angeles 14, California,
Attorney for Appellant.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

Textbooks

No. 15520

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JULES POND,

Appellant,

vs.

GENERAL ELECTRIC COMPANY, a corporation,

Appellee.

BRIEF OF APPELLANT.

Jurisdiction.

This court has jurisdiction of this appeal by reason of 28 U. S. C. Section 1291 which provides that Courts of Appeal have jurisdiction of appeals from all final decisions of the District Courts of the United States except where a direct review may be had in the Supreme Court.

This is an appeal from a judgment of dismissal of a complaint for damages for defamation. Such a judgment is appealable. (*Wright v. Gibson* (C. C. A. 9, Cal. 1942), 128 F. 2d 865; *Asher v. Ruppa* (C. C. A. 7, 1949), 173 F. 2d 10.) The District Court had jurisdiction by reason of the amount in controversy being over $3,000 and diversity of citizenship. [Tr. 3, 14.]

This is not a case appealable directly to the United States Supreme Court.

Specification of Error.

Dismissal of the action for alleged failure of the complaint to state facts constituting a cause of action or claim for relief was error.

Statement of the Case.

The question presented is whether a defamatory letter not libelous *per se* is actionable under the facts and circumstances detailed in the complaint.

ARGUMENT.

The appellee successfully urged in the trial court that a writing must be interpreted within its four corners and that unless the libel can be seen upon the face of the document no action can be maintained upon such writing.

Such never has been the law and the trend of the law today is away from archaic forms of pleadings in defamation actions which so frequently in the past resulted in "justice being smothered in her own robes." (*Harris v. Zarone,* 93 Cal. 59, 28 Pac. 845.)

The writing complained of is to be found in the Transcript of Record, page 19. It is a letter written by appellee to each of four prospective employers of appellant under the circumstances alleged in four separate causes of action. Each cause of action pertains to one of the prospective employers.

I.

Extrinsic Facts and Circumstances May Properly Be Pleaded and Proved.

That extrinsic facts and circumstances may be used to show the actual meannig of an otherwise harmless appearing document see *Baker v. Warner,* 231 U. S. 588, 594, 34 S. Ct. 175, 58 L. Ed. 384 where the Supreme Court said

> "But there is a middle ground where though the words are not libelous per se, yet, in the light of the extrinsic facts averred, they are susceptible of being construed as having a defamatory meaning. Whether they have such import is a question of fact. In that class of cases the jury must not only determine the existence of the extrinsic circumstances, which it is alleged bring to light the concealed meaning, but they must also determine whether those facts when coupled with the words, make the publication libelous. Van Vechten v. Hopkins, 5 Johns. 219."

To the same effect see *Erick Bowman Rem. Co. v. Jensen Salsbery Lab.* (C. C. A. 8, Minn. 1926), 17 F. 2d 255, 258, 52 A. L. R. 1187.

The Supreme Court of California is of the same view (*Ervin v. Record Publishing Co.,* 154 Cal. 79, 81, 97 Pac. 21; *Maynard v. Firemans Fund,* 34 Cal. 48 and 47 Cal. 207).

Confusion often arises from the statements of some courts that it is not the purpose of an innuendo to "beget an action", or that the meaning of language complained of cannot be enlarged or extended by the innuendo.

(*Lorentz v. R.K.O.,* 155 F. 2d 84, 87; *Bates v. Campbell,* 213 Cal. 438, 2 P. 2d 383; *Mellen v. Times-Mirror,* 167 Cal. 587, 140 Pac. 277.) In applying these rules the office of the inducement must not be forgotten. Where libel *per se* is not involved, explanation of what was *meant* by what was *said* may be shown by the inducement together with the innuendo.

In *Erick Bowman Rem. Co. v. Jensen Salsbery Lab.* (C. C. A. 8, Minn. 1926), 17 F. 2d 255, the court said at page 258,

> "Where words are not actionable per se, it is necessary to plead by way of inducement such extrinsic facts as will render the words actionable and to connect such extrinsic facts by proper colloquium with the particular words. (citing cases including Baker v. Warner, supra). The office of the inducement is to narrate the extrinsic circumstances which, coupled with the language published, affect its construction, and render it actionable, where, standing alone and thus not explained, the language would appear either not to concern the plaintiff, or, if concerning him, not to affect him injuriously. This being the office of the inducement, it follows that if the language does not naturally and per se refer to the plaintiff, nor convey the meaning the plaintiff contends for, or if it is ambiguous and equivocal, and requires explanation by some extrinsic matters to show its relation to the plaintiff, making it actionable, the complaint must allege by way of inducement, the existence of such extraneous matter."

Prosser on Torts (2nd Ed.), p. 582;

Harper & James, The Law of Torts (1956), Secs. 5.4, 5.5, 5.6, 5.27;

3 Restatement of the Law of Torts, Sec. 563.

are to the same effect.

In an article in 12 Southern California Law Review by Hall entitled "Pleading in Libel Actions in California" at page 231 the following appears

> ". . . When the words used are capable of two meanings, one dafamatory and one innocent, the plaintiff frequently must plead not only (by way of innuendo) that the words were used and understood in the defamatory sense, but also (by way of inducement) circumstances indicating that the words were understood in the defamatory sense. Events antedating the publication frequently must be pleaded to support the innuendo, e.g., to show the situation or information of the readers of the words was such that they derived the defamatory meaning from them.[1] Without pleading such inducement, the mere selection and statement by plaintiff of an innuendo may be entirely insufficient. Thus it has been declared again and again that an innuendo may not introduce a meaning broader than the words naturally bear, or introduce new matter, or enlarge the natural meaning of words. Therefore, unless the plaintiff supports his innuendo by the pleading of an inducement, he runs the risk of having the innuendo stricken on the ground that the words used are incapable of the innuendo which he has selected. If, on the other hand, the plaintiff has pleaded an inducement showing that those in the situation of the readers of the words reasonably would have understood them in the defamatory sense selected by the innuendo will stand."

---

[1](from Townshend on Slander and Libel §§ 308 & 335)
"It is the office of the inducement to set forth the extrinsic circumstances which, coupled with the language uttered, affects its construction and makes it actionable, where standing alone the language used would appear not to affect the plaintiff injuriously. . . . It has been frequently held that the inducement is necessary where the language does not naturally per se convey the meaning which the plaintiff would attribute to it."

II.
Extrinsic Facts.

Plaintiff had represented [Tr. 15-18, 5] to his prospective employer in each of the four instances involved in the complaint the facts pertaining to his 17 years of employment by General Electric affiliates as follows:

That plaintiff was:

Chief Engineer, Air Conditioning and Commercial Refrigeration Division, International General Electric Company, New York Office from Dec. 10, 1945 to Aug. 22, 1949 and that his duties included: training engineers for foreign field; supervision of quotations for special jobs; collaboration with G.E. factories in design adaptations for export; and issue of commercial engineering circular letters for I.G.E. distribution network; including personally conducted market survey of South and Southeast Asia and the Far East during the nine month round-the-world 1948-49 tour of duty.

Manager, Installation and Service Department, General Electric, S. A. Argentina, Feb. 1, 1942 to Oct. 31, 1945, and that his duties under that assignment included: supervision of erection, shop repair and field service of all G.E. installations (steam electric power plants, refrigeration and air conditioning, appliances, electronics, etc.) and electro-mechanical maintenance of G.E.S.A. office and factory building.

Air Conditioning Engineer, G.E.S.A. Buenos Aires, Argentina, March 1, 1937 to Feb. 1, 1942, and that his duties under that assignment included: sales of industrial process and comfort central plant

installations; contracting; personnel training; institutional work with power and light companies.

Refrigeration Engineer, General Electric S.A. Buenos Aires, Argentina, Sept. 1, 1934 to March 1, 1937, and that his duties under that assignment included: organization of service shops for power and light companies in inland provinces and training of technical personnel; sales of food conservation and industrial jobs; local manufacturing of fixtures and parts; and letting of contracts for related materials and labor.

Application Engineer, General Electric Appliances, S.A., Buenos Aires, Argentina, November 13, 1933, to September 1, 1934, and that his duties under that assignment included: training of sales crews, estimates, designs and preparation of service manuals.

Special Representative of International General Electric Company in Thailand, August 22, 1949, to August 24, 1950, for the purposes of negotiation of acceptance of International General Electric project on Hydro-electric Development by Siamese Government and assistance to distributor related to bids on Diesel Electric Locomotives for State Railways and on Steam Turbine Generating Sets for the Power Authority.

And plaintiff had also represented:

That while plaintiff was Chief Engineer he had shown ability to arouse enthusiasm and personal loyalty of his subordinates; that plaintiff was helpful in closing orders for refrigeration and air conditioning equipment.

That plaintiff's employer had always had a high opinion of plaintiff's engineering ability.

That according to reports to his employer on his Siamese assignment he had assisted the distributor in every way and that he was well liked not only by the members of the distributor's organization, but by the Siamese people in general.

That plaintiff had 17 years of service in the International General Electric organization. [Tr. 15-18; 5.]

All of said facts were true and were known by appellee to be true. [Tr. 5; ¶ IV.]

The inquirer had made specific inquiries of defendant as to:

First Cause of Action

plaintiff's honesty, loyalty, competency, responsbility, ability to get along with people, desirability as security risk, any other comments as to plaintiff's ability and character. [Tr. 4.]

Second Cause of Action

plaintiff's competence, trustworthiness, ability to get along with other people. [Tr. 11.]

Third Cause of Action

plaintiff's qualifications in regard to his character, sales ability and integrity and other characteristics. [Tr. 12; ¶ IV.]

Fourth Cause of Action

length of time plaintiff had been employed; job or jobs held; when and why employment was terminated; whether the employee would be eligible for

rehiring; whether the employee would be considered a good security risk; whether the employer considered plaintiff (a) superior; (b) above average; (c) average; (d) below average; or (e) poor as to: co-operation, reliability, capacity to progress, responsibility, honesty. The inquirer also requested "remarks." [Tr. 13-14; ¶ I.]

The letter of inquiry pertaining to causes of action I, II, and III did not ask whether plaintiff would be eligible for rehiring.

III.

The Offending Letter Viewed in the Light of the Extrinsic Facts.

Of all the facts known to appellees, including those recited in Exhibit A [Tr. 15-18], appellant's former employer would confirm only the following:

(a) that appellant had 17 years service in the International General Electric family;

(b) that appellant was hired by I. G. E. after his arrival in the United States, and was assigned to their Air Conditioning and Refrigeration Department; and

(c) that appellant submitted his resignation August, 1950.

The writer of the reply letter, while professing lack of "first hand information" concerning appellant, discloses possession of his personnel record. The personnel record admittedly embraces appellant's 17 years of service; yet the only information given out to the inquirer covered minutiae not asked for and of little or no interest to a prospective employer. The reply concludes with the

information (given gratuitously in 3 of the 4 causes of action) that appellee would not be prepared to consider appellant for re-engagement insofar as the writer could determine from appellant's records. None of the information given would reflect any reason for not wishing to re-engage appellant. The only inference to be drawn is that the records concerning appellant are not completely divulged and there is enough bad material in them to show a personnel specialist who has no "first hand" information that appellant would not be wanted back. The inquirer, assuming that Exhibit A [Tr. 15-18] is a genuine letter, would necessarily know that appellee's files contained at least the facts recited in Exhibit A bearing upon appellant's performance while in its employ. Yet as to his past duties appellee would not or felt it should not confirm any of his duties, not even that he had been Chief Engineer or that he had ever been employed by the I. G. E. family as an engineer. Appellee could not, or would not, make any comment concerning appellant's honesty, loyalty, competence, integrity or any of the other attributes specifically inquired about by the four prospective employers. Why did Mr. Pond's 17 years of continuous service not merit a statement that appellee's files showed nothing reflecting adversely upon him in any of those particulars? That is the very minimum that appellee could have said to avoid an inference harmful to appellant. Appellee's duty to make a forthright reply is greatly amplified by the knowledge that appellee had been authorized by I. G. E. to use Exhibit A. [Tr. 4; ¶ IV.] Nor was appellee content to allow matters to rest with mere ominous silence. The knockout punch is delivered by adding to the already unfavorable tenor of the reply letter the statement that Mr.

Pond from his records would not be considered for re-engagement.

For what possible purpose could appellee have volunteered the statement as to appellant's undesirability for re-engagement while at the same time withholding all favorable data if not to deter him from obtaining the job he sought? By simple algebraic principles a minus with no plus to counterbalance it results in a minus. The giving of negative information with nothing good to offset it could evidence only a desire to convince the reader of the letter that appellee knew only unfavorable facts concerning appellant.

In the case of the fourth cause of action where Mr. Pond's eligibility for re-hiring was one of the matters of inquiry, the same result obtains. Appellee knew that it would answer that inquiry with a negative reply. Why then did it withhold everything good about Pond in its files unless it wished to have the inquirer believe that its files did not justify a favorable recommendation either generally or in the particulars directly inquired about?

Although when isolated the letter of reply was a cleverly conceived device for giving appellant a bad recommendation, the law does not permit the doing of an act indirectly that can not be done directly. *Quando aliquid prohibetur ex directo, prohibetur et per obliquum.* (*El Claro Oil & Gas Co. v. Daugherty,* 11 Cal. App. 2d 274, 281, 53 P. 2d 1028; *Estate of Keane,* 56 Cal. 407; *Woodward v. Brown,* 119 Cal. 283, 294, 51 Pac. 2.)

It was therefore error for the lower court to read the letter complained of by its four corners and to fail to consider the extrinsic facts as imparting an injurious meaning thereto.

IV.

The Letter Was Not Privileged.

Section 47, Subdivision 3, California Civil Code, does not confer privilege upon the communication herein.

Said code section provides: "In a communication, without malice, to a person interested therein, (1) by one who is also interested," etc.

By its very definition, the code section only applies to a communication without malice. The complaint expressly alleges malice. [Tr. 10, ¶ XV; 7, ¶ X.]

The Supreme Court of California holds that the privilege provided by the above code section is a conditional privilege which is destroyed by malice. (*Brewer v. Second Baptist Church,* 32 Cal. 2d 791, 197 P. 2d 713). In the same case the court's language indicates that the privilege is also lost where defendant has no reasonable grounds to believe that the statement made is true. [Tr. 9; ¶ XIII.] To the same effect see Restatement of the Law, Torts, Volume 3, Sections 600-601.

It was therefore error for the District Court to base any action in dismissing the complaint upon the above statute.

V.

Conclusion.

For the reasons hereinbefore given the judgment of dismissal should be reversed.

Respectfully submitted,

Russell K. Lambeau,

Attorney for Appellant.